NCK METAL SDN BHD

v.

BUMIPUTRA-COMMERCE BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD HISHAMUDIN YUNUS J
[CIVIL SUIT NO: D6-24-199-2001]
18 JUNE 2003

BANKING: *Securities for advances - Guarantee given by bank - Whether bank guarantees were "continuing guarantees" - Whether third bank guarantee renewed first and second bank guarantees - Whether claim only pursuant to third bank guarantee only - Whether third bank guarantee an unconditional guarantee - Whether claim in accordance with terms of third bank guarantee*

This was an application by the plaintiff for a declaration that the defendant was liable to pay the plaintiff the sum of RM350,000 pursuant to the terms of the defendant's three bank guarantees dated 13 June 1998 ('the first bank guarantee'), 11 June 1999 ('the second bank guarantee') and 8 June 2000 ('the third bank guarantee'). Under the first bank guarantee, the defendant guaranteed to pay to the plaintiff within 14 days of demand all sums of money owing to the plaintiff by a company known as Able Pile Construction Sdn Bhd ('APSB') in respect of the supply of raw material by the plaintiff to APSB up to an aggregate sum of RM350,000. The first bank guarantee provided that it would be a "continuing guarantee" for the whole amount due by APSB to the plaintiff which may have arisen from 12 June 1998 to 11 June 1999. The second and third bank guarantees were similar in terms to the first and provided that they would be "continuing guarantees" for the whole of the amount due by APSB to the plaintiff which may have arisen from 12 June 1999 to 11 June 2000, and from 12 June 2000 to 11 June 2001, respectively. However, the third bank guarantee contained an endorsement that superseded and cancelled the second bank guarantee.

The plaintiff, upon default of payment by APSB, demanded *via* letter from the defendant the sum of RM350,000 under the terms of the third bank guarantee. This claim, however, was rejected by the defendant which contended that all transactions occurred before the validity period of the third bank guarantee. Thus, the issues requiring determination were whether: (1) the plaintiff had sought to enforce its rights under the first bank

guarantee, second bank guarantee or third bank guarantee, or under all three bank guarantees; (2) the first, second and third bank guarantees were unconditional or conditional; and (3) the plaintiff had claimed the sum demanded in accordance with the terms of the applicable bank guarantee.

Held:

[1] On the facts, although all three bank guarantees contained the words "continuing guarantee", it was meaningless because whilst the relevant clause spoke of a continuing guarantee, it also "limits" the claim to a specified "guarantee period" of one year. The guarantee period for the first bank guarantee was limited to the period from 12 June 1998 to 11 June 1999; the second bank guarantee, from 12 June 1999 to 11 June 2000; and the third bank guarantee, from 12 June 2000 to 11 June 2001. (p 192 e-f)

[1a] The second bank guarantee was, in a sense, a renewal of the first bank guarantee. However, since the third bank guarantee had superseded and cancelled the second bank guarantee, the third bank guarantee had no link or nexus with either the first or second bank guarantee, and therefore did not cover all the debts of APSB. (p 194 b, d-f)

[1b] Furthermore, the plaintiff's letter of demand specifically referred to the third bank guarantee; hence, the plaintiff was making a claim pursuant to the third bank guarantee only, and not all the three bank guarantees. (p 194 g)

[2] A bank guarantee should be treated as being "on demand" or unconditional if there is a clear statement in the guarantee that the amount guaranteed was payable by the bank simply upon a written demand being made, even though there might be some indications to the contrary elsewhere in the document. Therefore, the third bank guarantee was an "on demand" or unconditional guarantee as it contained a clause stating that the amount guaranteed was payable by the defendant bank simply upon a written demand being made. (p 197 d-g)

[3] Although the third bank guarantee was an unconditional guarantee, it must clearly have been shown in the plaintiff's letter of demand that the claim was in accordance with the terms of the said guarantee. On the facts, the plaintiff's claim was in respect of transactions made outside the guarantee period of the third bank guarantee; therefore, the plaintiff's demand to the defendant was not in accordance with the terms of the third bank guarantee, and the defendant had acted correctly in rejecting the plaintiff's claim. (pp 198 c & 200 c-e)

[Application dismissed.]

Case(s) referred to:
China Airlines Ltd v. Maltran Air Corp Sdn Bhd [1996] 3 CLJ 163 FC ***(foll)***
Esal (Commodities) Ltd & Anor v. Oriental Credit Ltd & Anor [1985] Lloyd's Rep 546 ***(foll)***
IE Contractors Ltd v. Lloyd's Bank Plc [1990] 51 BLR 1 ***(foll)***

Other source(s) referred to:
Poh Chu Chai, *Law of Banking Volume 2: Pledges, Guarantees and Letters of Credit*, 3rd edn, p 309

For the plaintiff - Joy Appukutan (David Lee); M/s SK Yeoh & Partners
For the defendant - Mahathir Abdullah; M/s Shahrum Shah Chin & Mahathir

[The plaintiff has appealed to the Court of Appeal vide Civil Appeal No: W-02-261-2002]

Reported by Suresh Nathan

JUDGMENT

Mohd Hishamudin Yunus J:
This originating summons is an application by the plaintiff for a declaration that the defendant is liable to pay the plaintiff the sum of RM350,000 pursuant to the terms of the defendant's three bank guarantees dated 13 June 1998, 11 June 1999 and 8 June 2000, together with costs and interests.

The Facts
The facts are not disputed.

On 13 June 1998, the defendant issued to the plaintiff a bank guarantee, namely, Bank Guarantee No. 9800057 (shall be referred to as the "first bank guarantee". Under the first bank guarantee the defendant guaranteed to pay to the plaintiff within 14 days of demand all sums of money owing to the plaintiff by a company known as "Able Pile Construction Sdn. Bhd." (shall be referred to as "APSB") in respect of the supply of raw material by the plaintiff to APSB up to an aggregate sum of RM350,000.

The first bank guarantee provides that it shall be a "continuing guarantee" for the whole of the amount due by APSB to the plaintiff which may have arisen from 12 June 1998 until 11 June 1999. The contents of the first bank guarantee read as follows:

Date: 13th June 1998

MESSRS. NCK METAL SDN. BHD
1st Floor Wisma NCK 3
Lot 45A Section 92A
3 1/2 Mile Jalan Sungai Besi
57100 Kuala Lumpur

BANK GUARANTEE NO: 9800057 FOR RM350,000.00

In consideration of you; NCK METAL SDN. BHD of 1st Floor Wisma NCK 3, Lot 45A Section 92A, 3 1/2 Mile Jalan Sungai Besi, 57100 Kuala Lumpur at our request to supply raw material (hereinafter referred to as "the said supply") to ABLE PILE CONSTRUCTION SDN BHD of Lot No 1356, Jalan Tanjung Shawal, 41000 Klang, Selangor Darul Ehsan hereinafter referred to as "the customer"), we hereby agree with you as follows:

We hereby guarantee to pay you within fourteen (14) days of demand all sums of money together with all incidental charges, expenses and interests which now or shall at anytime by owing to you by the customer arising from or in connection with the said supply PROVIDED ALWAYS that the total liability ultimately enforceable against us under this Guarantee shall not exceed in aggregate the sum of RM350,000.00 (Ringgit Malaysia: Three Hundred Fifty Thousand Only).

This Guarantee shall be a continuing Guarantee to you (within the limits aforesaid) for the whole of the amount which shall be due and owing to you by the customer which may have arisen from 12th June 1998 until 11th June 1999 (both dates inclusive – hereinafter referred to as "the guarantee period").

You may at anytime at your absolute discretion and without giving any notice whatsoever to us refuse any of the said supply or any of the said credit facilities to the customer and grant to him anytime or other indulgence and compound with him without discharging or impairing our liability under this Guarantee.

Notwithstanding any other provision herein before contained, if on the expiry fourteen (14) days after the date of this guarantee or any subsequent renewed guarantee given by us, we have not received any demand from you, this guarantee or any subsequent renewed guarantee as the case may be shall lapse and cease to have effect whatsoever and we shall be deemed to be discharged and released from all any liability under this guarantee without prejudice however to any claim which you may make prior to the expiration of the said fourteen (14) days period.

Yours faithfully,

For BANK BUMIPUTRA MALAYSIA BERHAD
SECTION 18 SHAH ALAM BRANCH

Sgd.

(AUTHORISED SIGNATURES)
ABDULLAH HJ. AHMAD

On 11 June 1999, the defendant issued to the plaintiff another bank guarantee, namely, Bank Guarantee No. G244327 (shall be referred to as the "second bank guarantee"), on terms similar to that of the first bank guarantee.

The second bank guarantee provides that it shall be a "continuing guarantee" for the whole of the amount due by APSB to the plaintiff which may have arisen from 12 June 1999 until 11 June 2000. The second bank guarantee is worded as follows:

Date: 11th June 1999

MESSRS. NCK METAL SDN. BHD
1st Floor Wisma NCK 3
Lot 45A Section 92A
3 1/2 Mile Jalan Sungai Besi
57100 Kuala Lumpur

BANK GUARANTEE NO: G244327 FOR RM350,000.00

In consideration of you; NCK METAL SDN. BHD of 1st Floor Wisma NCK 3, Lot 45A Section 92A, 3 1/2 Mile Jalan Sungai Besi, 57100 Kuala Lumpur at our request to supply raw material (hereinafter referred to as "the said supply") to ABLE PILE CONSTRUCTION SDN BHD of Lot No 1356, Jalan Tanjung Shawal, 41000 Klang, Selangor Darul Ehsan hereinafter referred to as "the customer"), we hereby agree with you as follows:

We hereby guarantee to pay you within fourteen (14) days of demand all sums of money together with all incidental charges, expenses and interests which now or shall at anytime by owing to you by the customer arising from or in connection with the said supply PROVIDED ALWAYS that the total liability ultimately enforceable against us under this Guarantee shall not exceed in aggregate the sum of RM350,000.00 (Ringgit Malaysia: Three Hundred Fifty Thousand Only).

This Guarantee shall be a continuing Guarantee to you (within the limits aforesaid) for the whole of the amount which shall be due and owing to you by the customer which may have arisen from 12th June 1999 until 11th June 2000 (both dates inclusive – hereinafter referred to as "the guarantee period").

You may at anytime at your absolute discretion and without giving any notice whatsoever to us refuse any of the said supply or any of the said credit facilities to the customer and grant to him anytime or other indulgence and compound with him without discharging or impairing our liability under this Guarantee.

Notwithstanding any other provision herein before contained, if on the expiry fourteen (14) days after the date of this guarantee or any subsequent renewed guarantee given by us, we have not received any demand from you, this guarantee or any subsequent renewed guarantee as the case may be shall lapse and cease to have effect whatsoever and we shall be deemed to be discharged and released from all any liability under this guarantee without prejudice however to any claim which you may make prior to the expiration of the said fourteen (14) days period.

Yours faithfully,

For BANK BUMIPUTRA MALAYSIA BERHAD

SECTION 18 SHAH ALAM BRANCH

Sgd.	Sgd.
(AUTHORISED SIGNATURES)	
ABDULLAH HJ. AHMAD	AFFANDI B. YAAKOB

On 8 June 2000, the defendant issued to the plaintiff a third bank guarantee, namely, Bank Guarantee No. G244454 (shall be referred to as the "third bank guarantee"), on terms similar to that of the first and second bank guarantees.

a The third bank guarantee provides that it shall be a "continuing guarantee" for the whole of the amount due by APSB to the plaintiff which may have arisen from 12 June 2000 until 11 June 2001. This third bank guarantee reads:

b Date: June 8, 2000

NCK Metal Sdn. Bhd.
1st Floor, Wisma NCK 3
Lot 45 A, Section 92 A
3 1/2 Mile, Jalan Sungai Besi
57100 Kuala Lumpur

c Dear Sir,

BANK GUARANTEE NO: G 244454 FOR RM350,000.00

d At the request of Messrs. Able Pile Construction Sdn. Bhd. of Lot No. 356, Jalan Tanjung Shawal, 41000 Klang, Selangor Darul Ehsan. We Bumiputra Commerce Bank Berhad of No. 49, 51 & 53, Jalan Pinang B 18/B, Section 18, 40000 Shah Alam, Selangor Darul Ehsan hereby guarantee that a sum of RM350,000.00 (Ringgit Malaysia: Three Hundred Fifty Thousand Only) being proposal to supply raw material, we hereby agree with you as follows:

e We hereby guarantee to pay you within fourteen (14) days of demand all sums of money together with all incidental charges, expenses and interests which now or shall at anytime be owing to you by the customer arising from or in connection with the said supply PROVIDED ALWAYS that the total liability ultimately enforceable against us under this Guarantee shall f not exceed in aggregate the sum of RM350,000.00 (Ringgit Malaysia: Three Hundred Fifty Thousand Only).

This Guarantee shall be a continuing Guarantee to you (within the limits aforesaid) for the whole of the amount which shall be due and owing to you by the customer which may have arisen from 12th June, 2000 until g 11th June, 2001 (both dates inclusive – hereinafter referred to as "the guarantee period").

You may at anytime at your absolute discretion and without giving any notice whatsoever to us refuse any of the said supply or any of the said credit facilities to the customer and grant to him anytime or other h indulgence and compound with him without discharging or impairing our liability under this Guarantee.

i

Notwithstanding any other provision herein before contained, if on the expiry thirty (14) days after the date of this guarantee or any subsequent renewed guarantee given by us, we have not received any demand from you, this guarantee or any subsequent renewed guarantee as the case may be shall lapse and cease to have effect whatsoever and we shall be deemed to be discharged and released from all any liability under this guarantee without prejudice however to any claim which you may make prior to the expiration of the said thirty (14) days period.

Thank you.

Yours faithfully,

For BUMIPUTRA COMMERCE BANK BERHAD

SECTION 18 BRANCH, SHAH ALAM

sgd.
(Authorised Signatures) sgd..
HAI TUCK LEONG AHMAD FATHI MENAWAR

This Bank Guarantee is to supercede and cancel Bank Guarantee No. G244327

It will be observed that this third bank guarantee contains the endorsement:

This Bank Guarantee is to supercede and cancel Bank Guarantee No. G244327

immediately below the authorized signatures. "Bank Guarantee No. G244327" mentioned in the endorsement is the second bank guarantee. This means the third bank guarantee superceded and canceled the second bank guarantee.

By a letter dated 23 March 2001 (at exh. NCK4 of encl. 2), the plaintiff demanded from the defendant the sum of RM350,000 under the terms of the third bank guarantee. The letter reads:

Saturday, March 23, 2001
Our ref: M/1001040/01

Bumiputra – Commerce Bank Bhd
49 51 & 53 Jalan Pinang B 18/B Section 18
40000 Shah Alam
Selangor Darul Ehsan

Attention: Tuan Haji Ahmad Fathi, Manager

Dear Sir,

RE: BANK GUARANTEE NO. G 244454 FOR RM 350,000.00

We refer to the above bank guarantee under your bank ref: HAFM/HTL/lin/G244454 dated June 8, 2000, we hereby would like to make a claim of RM350,000.00 (Ringgit Malaysia: Three Hundred & Fifty Thousand Only) against our client Messrs: Able Pile Construction Sdn. Bhd. of Lot no. 356, Jalan Tanjung Shawal, 41000 Klang, Selangor Darul Ehsan. The aforesaid party had failed to make payments within the specified period.

Should you have any queries pertaining to the above, please do not hesitate to contact our Miss Chin at telephone no. 79813888 ext. 215.

Thank you.

Yours faithfully,

NCK METAL SDN. BHD.

sgd.
Authorised Signatories

The defendant *vide* its letter of 5 July 2001 rejected the above claim. The defendant's letter reads:

Date: July 5, 2001

NCK Metal Sdn. Bhd.
1st Floor, Wisma NCK 3
Lot 45A, Section 92A
3 1/2 Mile, Jalan Sungai Besi
57100 Kuala Lumpur

Dear Sir,

BANK GUARANTEE NO. G244454 FOR RM350,000
FAVOURING: M/S ABLE PILE CONSTRUCTION SDN. BHD.

We refer to your claim letter dated 23rd March, 2001 in respect of the Bank Guarantee.

Based on the documents available, we regret to inform that your claim is rejected as all the transactions occurred before the validity period of the Bank Guarantee. The claim is also invalid against the preceding Bank Guarantee No. 9800057 and No. G24427 as it is out of time.

Thank you.

Yours faithfully
For BUMIPUTRA-COMMERCE BANK BERHAD
SECTION 18 BRANCH, SHAH ALAM

sgd.
(Hj. Ahmad Fathi Menawar)
Branch Manager

The Issues

The issues before me are as follows:

(1) Whether the plaintiff, by its letter of demand of 23 March 2001, has sought to enforce its rights under the first bank guarantee, or under the second bank guarantee, or under the third bank guarantees; or under all the three bank guarantees.

(2) Whether the first, second and third bank guarantees were unconditional or conditional.

(3) Whether the plaintiff has claimed the sums demanded in accordance with the terms of the applicable bank guarantee.

(1) Whether The Plaintiff, By Its Letter Of Demand Of 23 March 2001, Has Sought To Enforce Its Rights Under The First Bank Guarantee, Or Under The Recond Bank Guarantee, Or Under The Third Bank Guarantees; Or Under All The Three Bank Guarantees?

In the first prayer of the originating summons, the plaintiff has sought the declaration based upon the first, second and third bank guarantees. In other words, the plaintiff sought to enforce all the three bank guarantees.

However, if reference is made to all the correspondence issued by the plaintiff (see exhs. "NCK4", "NCK5", "NCK6", "NCK7" and "NCK8", of encl. 2), it will be noted that they clearly refer to Bank Guarantee No. G244454, that is to say, they refer to the third bank guarantee. There was no demand made pursuant to either the first or the second bank guarantee. Accordingly, I am of the view that the plaintiff's demand under the correspondence was only pursuant to the third bank guarantee.

This being the case, the court therefore must have regard specifically and solely to the terms of the third bank guarantee in determining whether the plaintiff is entitled to a declaration that the defendant is liable to pay the sum of RM350,000 to the plaintiff.

The learned counsel for the plaintiff, in his written submission, argues that the second bank guarantee renewed the first bank guarantee, and the third bank guarantee renewed the first and second bank guarantees.

He further contends that all the three bank guarantees were "continuing guarantees". He submits that since all the three bank guarantees were "continuing guarantees" and that the third bank guarantee was a renewal of the second and first bank guarantees, therefore, it was sufficient for the letter of demand to refer only to the third bank guarantee as the third bank guarantee (to quote learned counsel at p. 3 of the plaintiff's written submission in reply at encl. 14)) "covers all the indebtedness of Able Pile".

I am unable to accept such a contention.

In contending that each of the three bank guarantees is a continuing bank guarantee, the learned counsel for the plaintiff refers to *Law of Banking Volume 2: Pledges, Guarantees and Letters of Credit* (3rd. edn.) by Poh Chu Chai. At p. 309 of the book, the learned author opines:

> A guarantee which is worded as a continuing guarantee is wide enough to cover the past as well as the future indebtedness of a principal debtor.

In my judgment, in the present case, although each of the three bank guarantees contains the words, "continuing guarantee", nevertheless, such an expression, to my mind, is meaningless because whilst the relevant clause speaks of a continuing guarantee yet this very same clause, in the same breath, "limits" (the actual words used in the bank guarantee being "(within the limits aforesaid)") the claim to a specified "guarantee period" of one year. The guarantee period for the first bank guarantee was limited to the period from 12 June 1998 to 11 June 1999; the guarantee period for the second bank guarantee was limited to the period from 12 June 1999 to 11 June 2000; and the guarantee period for the third bank guarantee was limited to the period from 12 June 2000 to 11 June 2001.

Take the first bank guarantee for example. The relevant clause states:

> This Guarantee shall be a continuing Guarantee to you (within the limits aforesaid) for the whole of the amount which shall be due and owing to you by the customer which may have arisen from 12th June 1998 until 11th June 1999 (both dates inclusive – hereinafter referred to as "the guarantee period").

In my opinion, notwithstanding the words "continuing guarantee", the guarantee did not cover past and future transactions or indebtedness of APSB – as a true continuing guarantee should. This first bank guarantee only covered any debt incurred by APSB during the guarantee period, that is to say, from 12 June 1998 until 11 June 1999. It did not cover any transaction or debt incurred before 12 June 1998; nor did it cover any transaction or debt incurred after 11 June 1999. The words "(within the limits aforesaid)" appearing immediately after the words "a continuing guarantee to you" reinforce my view.

Did the second bank guarantee renew the first bank guarantee; and the third bank guarantee, in turn, renew the second bank guarantee, as claimed by the plaintiff? The answer is: it depends on what one means by the word "renew". However, comparing all the three bank guarantees, it is to be observed that the wordings are similar, in particular:

(a) in all the three bank guarantees, the parties were the same, namely–

(i) the defendant, as the guarantor;

(ii) the plaintiff, as the beneficiary; and

(iii) APSB, as the company on whose behalf the guarantee was given;

(b) in all the three bank guarantees, the undertaking was the same: to guarantee due payment by APSB in respect of the supply of raw material by the plaintiff to APSB;

(c) all the three bank guarantees are of the "on demand" type, meaning they are unconditional (this will be explained shortly when I deal with the second issue);

(d) all the three bank guarantees contain the words "or any subsequent renewed guarantee given by us"; and

(e) all the three bank guarantees contain a one-year guarantee period, and, although one guarantee period is different from the other, nevertheless, the three guarantee periods are three consecutive periods.

According to the *Concise Oxford Dictionary* (10th edn.), one of the meanings of "renew" is:

3. extend the period of validity of (a licence, subscription, or contract).

I take this meaning as the ordinary meaning of "renew" in the context of contractual relationships.

In my opinion, on the basis of the above facts and, in particular, fact (d) (the presence of the words "or any subsequent renewed guarantee given by us" in the first bank guarantee), and bearing in mind the ordinary meaning of "renew" as stated above, I am prepared to accept that the second bank guarantee was, in a sense, a renewal of the first bank guarantee. However, I have difficulty in accepting the third bank guarantee as a renewal of the second and first bank guarantees. I say so for this reason. As has been pointed out earlier, there is an endorsement (appearing below the authorized signatures) in the third bank guarantee that clearly states that the third bank guarantee superceded and cancelled the second bank guarantee. And it is significant to note that such an endorsement does not appear in the second bank guarantee *vis-a-vis* the first bank guarantee. To my mind, the presence of the endorsement in the third bank guarantee and the absence of a similar endorsement in the second bank guarantee indicate that the third bank guarantee was not a renewal of the second guarantee unlike the second bank guarantee *vis-a-vis* the first bank guarantee. Unlike the second bank guarantee *vis-à-vis* the first bank guarantee, the third bank guarantee had superceded and cancelled the second bank guarantee. The third bank guarantee was a fresh bank guarantee, a separate bank guarantee altogether from the second bank guarantee. As a consequence, there was no nexus between the third bank guarantee and the second bank guarantee, unlike the second bank guarantee *vis-à-vis* the first bank guarantee. If there was no nexus between the third bank guarantee and the second bank guarantee, a *fortiori* the third bank guarantee cannot have any nexus with the first bank guarantee.

Since the third bank guarantee has no link or nexus either with the first bank guarantee or the second bank guarantee, therefore, the third bank guarantee does not cover all the debts of APSB. And it follows the plaintiff's letter of demand which specifically referred to the third bank guarantee cannot be taken to be made pursuant to all the three bank guarantees. On this premise, I hold that the plaintiff, on the strength of its letter of demand (at exh. NCK4 of encl. 2), was making a claim only pursuant to the third bank guarantee, and not pursuant to all the three bank guarantees.

The plaintiff in its written submission, however, contends (at p. 3 of the plaintiff's written submission at encl. 14):

> The Defendant's submission that each bank guarantees supercedes and cancels the other is, with respect, misplaced. There are no such terms in the Bank Guarantee to suggest such an allegation.

With respect, and perhaps rather unfortunately, learned counsel for the plaintiff, having said the above, did not proceed to explain the existence and effect of the endorsement found at the bottom of the third bank guarantee below the authorized signatures.

(2) Whether The First, Second And Third Bank Guarantees Were Unconditional Or Conditional.

The plaintiff submits that all the three bank guarantees were unconditional bank guarantees. Since they were unconditional, it was sufficient for the plaintiff merely to demand payment under the third bank guarantee without having to substantiate the claim.

The defendant, on the other hand, submits that the bank guarantees were conditional. As they were conditional, therefore, in the context of the third bank guarantee, it was necessary for the plaintiff to also state in the claim that the liability was incurred by APSB during the guarantee period of the third bank guarantee, that is to say, from 12 June 2000 to 11 June 2001.

In *China Airlines Ltd v. Maltran Air Corp Sdn Bhd* [1996] 3 CLJ 163 the wordings of the letter of guarantee read as follows:

LETTER OF GUARANTEE

> We PERWIRA HABIB BANK MALAYSIA BERHAD, Cawangan Bandar, Tingkat Bawah Wisma Pahlawan, Jalan Sulaiman, 50000 Kuala Lumpur, hereby undertake to pay on demand to MESSRS CHINA AIRLINES LIMITED the sum of MYR400,000 (Malaysian Ringgit Four Hundred Thousand Only) as may be required for the due performance of the covenants in the contract between you and MESSRS MALTRAN AIR CORPORATION SDN BHD, 79, 2nd Floor, Jalan Bukit Bintang, 55100 Kuala Lumpur. The said sum shall become payable by us in the event of the said MESSRS MALTRAN AIR CORPORATION SDN BHD'S failure to perform the said covenants.

In this case cited, Mohamed Dzaiddin FCJ (as he then was), in delivering the judgment of the Federal Court, explained the meaning of "conditional bond" and "unconditional bond" as follows (at pp. 181-182):

> A bank guarantee is a performance bond. There are two types of performance bond. The first type is a conditional bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second type is an unconditional or "on demand" performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract. According to the learned authors of *"The Modern Contract of Guarantee"*, 2nd edn p. 664, the tendency of the English courts (since, according to the authors, that the Australian courts have not yet been faced with the same problems of construction) has been to treat the performance bonds as unconditional if there was a clear statement that the amount guaranteed was payable by the bank simply upon a written demand being made, even though there might by some indications to the contrary elsewhere in the document. The learned authors cited *Esal (Commodities) Ltd*'s case, where the bank "undertook to pay the said amount on your written demand **in the event that the supplier fails to execute the contract in perfect performance**" (emphasis added), it was held that the latter words did not alter the fact that the moneys were payable upon a written demand being made as stated in the earlier part of the clause. The beneficiary of the bond did not have to show a failure to perform by the supplier in order to claim upon the bond.

In *IE Contractors Ltd v. Lloyd's Bank Plc* [1990] 51 BLR 1, Staughton LJ was of the view that in cases of ambiguity, there was "a bias or presumption" that performance bonds were not payable upon proof of facts, but were payable merely upon the presentation of the appropriate documents (that is, in the case of unconditional bonds upon the making of a written demand). The Federal Court in *China Airlines Limited* (above cited, at p. 182), approved this approach.

The rationale for the above principle of interpretation in respect of performance bonds or banks guarantee is well stated by Ackner LJ (as he then was) in the English Court of Appeal case of *Esal (Commodities) Ltd & Anor v. Oriental Credit Ltd & Anor* [1985] Lloyd's Rep 546 where his Lordship said (at p. 549-550):

> As regards the first interpretation, Mr. Tugendhat is obliged to accept that if he is right, the bank, by entering into the performance bond is taking upon itself the obligation of deciding the merits of a dispute under a contract of sale, a function for which it is virtually common ground the bank is wholly unfitted and which the parties could not sensibly have intended. As Mr. Sumption for WF correctly submitted, if the performance

> bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent court of jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment. There is no need to cite, at any length, the well-known case of *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] Lloyds Rep 166; [1978] 1 QB 159 as to the general nature of a performance bond, where it is stressed that a bank is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not, the only exception being where there is clear evidence of fraud and of the bank's knowledge of that fraud.

The above rationale was cited with approval by the Federal Court in *China Airlines Limited* (at p. 183).

There is a principle that can be abstracted from the above authorities and it is that a performance bond or a bank guarantee should be treated as being "on demand" or unconditional if there is a clear statement in the bond or guarantee that the amount guaranteed was payable by the bank simply upon a written demand being made, even though there might be some indications to the contrary elsewhere in the document. For a court to regard a performance bond or a bank guarantee as being conditional, there must be clear words to that effect in the document concerned.

Relying on the above authorities, I hold that the third bank guarantee was an "on demand" or unconditional guarantee. This is because the second clause of the third bank guarantee states:

> We hereby guarantee to pay you within fourteen (14) days of demand all sums of money together with all incidental charges, expenses and interests which now or shall at any time be owing to you by the customer arising from or in connection with the said supply …

To my mind, the above is a clear statement that the amount guaranteed was payable by the defendant bank simply upon a written demand being made.

Also relying on the above authorities, I am of the view that the presence of indications to the contrary in the third bank guarantee such as (if at all they can be said to be indications to the contrary) "owing to you by the customer arising from or in connection with the said supply" and "which

may have arisen from 12 June 2000 until 11 June 2001" in the third bank guarantee does not make the guarantee any less an "on demand" or an unconditional guarantee.

(3) Whether The Plaintiff Has Claimed The Sums Demanded In Accordance With The Terms Of The Applicable Bank Guarantee

Since the third bank guarantee was an "on demand" or unconditional guarantee, therefore, based on the principles enunciated in the above-cited authorities, the plaintiff in presenting its claim to the defendant was under no obligation to substantiate its claim.

However, although the third bank guarantee was an unconditional bank guarantee and that the plaintiff did not have to substantiate its claim, nevertheless, in my judgment, it does not follow that the plaintiff was under no obligation at all to show in its letter of demand that the claim was within the terms of the third bank guarantee. True, the letter of demand did not have to be accompanied by any proof (be it documentary or otherwise) of the debt. But that does not mean that the letter of demand could be brief and simple, containing only a statement demanding payment. The principle of law requires the letter of demand to be so worded such that it is clear to the guarantor/bank that the claim was within the terms of the bank guarantee.

In *Esal (Commodities) Ltd* the material words of the undertaking in the performance bond read:

> We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance.

Ackner LJ held (at pp. 549-550):

> However, I accept Mr. Tugendhat's alternative submission that in addition to the beneficiary making the demand, he must also inform that he does so on the basis provided for in the performance bond itself.
>
> This interpretation not only gives meaning and effect to the words "in the event that supplier fails …" which otherwise would be mere surplasage, but it in no way imposes extravagant demand upon the bank. A beneficiary may seek, honestly or dishonestly, to apply a performance bond to the wrong contract, and the need to inform the bank of the true basis upon which he is making his demand may be very salutary.

This approach by the English Court of Appeal was approved by the Federal Court in *China Airlines Limited.* Mohamed Dzaiddin FCJ, in delivering the judgment of the court, said:

> From the above conclusion of the learned judge, we form the view that she has construed AC4 as a conditional guarantee, although recognizing that it is an "on demand" guarantee. However, in arriving at her conclusion that the payment out of the sum of RM400,000 under the said guarantee was lawfully made, we find that she had applied the same approach as in *Esal*, where Ackner LJ accepted the alternative submission of counsel for OCL that in addition to the beneficiary of the performance making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself. Needless to say, in the circumstances of the present case, we consider this to be the correct approach.

In the present case, is there any clear indication in the plaintiff's letter of demand (exh. NCK4 of encl. 2) to the effect that the claim was within the terms of the third bank guarantee? I think the answer is "No". In the instant case, all that the plaintiff had asserted in its letter of demand was merely (besides the statement of demand):

> The aforesaid party had failed to make payments within the specified period.

To my mind, the above statement is insufficient. Considering that the express terms of the third bank guarantee provide, *inter alia*, that:

> ... (the defendant guarantees to pay to the plaintiff all sums of money) **which now or shall at any time be owing by to you by the customer arising from or in connection with the said supply.**

and

> … (the) guarantee shall be a continuing Guarantee to (the plaintiff) for the whole of the amount which shall be due and owing to you by the customer **which may have arisen from 12th June 2000 until 11th June 2001.** (emphasis added)

in order to satisfy the requirement of the law, the letter of demand, besides containing the statement of demand, must also assert that:

(1) firstly, the sums of money claimed represented the sums of money owing to the plaintiff by ABSB arising from or in connection with the supply of raw material; and

(2) secondly, the transactions (the supply of the raw material by the plaintiff to APSB) were carried out by the plaintiff and APSB within the guarantee period, that is to say, from 12 June 2000 until 11 June 2001.

However, in the present case, the documents supplied by the plaintiff to the defendant (see exh. "NCK5", encl. 2), upon the latter's request, far from clearly showing that its (plaintiff's) claim was within the terms of the third guarantee, instead, show that the transactions (the supply of raw material by the plaintiff to APSB) relied upon by the plaintiff for the purpose of its claim were made in 1998 and 1999 (in this regard, however, the Debit Notes bearing No. 9354, dated 30 June 2000, until No. 9903, dated 31 January 2001, have to be ignored as they are interests imposed in respect of transactions effected outside the guarantee period). Indeed, plaintiff's counsel in his written submission acknowledges this fact (see para. 4.1.2 (b) of plaintiff's written submission at encl. 9). Bearing in mind that the guarantee period for the third bank guarantee was from 12 June 2000 until 11 June 2001, this means that the plaintiff's claim was in respect of transactions made outside the guarantee period of the third bank guarantee. This being the case, the plaintiff in making a claim under the third bank guarantee had been labouring under a misconception.

It is, therefore, my finding that the plaintiff's demand to the defendant is not in accordance with the terms of the third bank guarantee.

In conclusion, I rule that although the third bank guarantee is an on demand or unconditional guarantee, nevertheless, it must be clearly shown in the plaintiff's letter of demand that the claim is in accordance with the terms of the said guarantee. In the present case, the plaintiff's claim was not in accordance with the terms of the third bank guarantee. Thus the defendant had acted correctly in rejecting the plaintiff's claim.

By reason of the above grounds I hold that the plaintiff has no cause of action against the defendant. The suit is dismissed with costs.